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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

CHARLES ATKINS, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE,
Petitioner,

v.

SANTOS RIVERA, et al.,
Respondents.

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF FOR SUSAN REED AND WADIE REESE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

This case turns upon the meaning of §1902(a)(10)(c)(i)(III) of the Medicaid Act [42 U.S.C. §1396a(a)(10)(C)(i)(III)]. That provision, (hereinafter §(a)(10)(C)), requires that states which maintain optional Medicaid programs for the "medically needy"[1]/ include in their state plans a description of:

> the single standard to be employed in determining income and resource eligibility for all such [medically needy] groups, and the methodology to be employed in determining such eligibility, which shall be the same methodology which would be employed under the [SSI] program

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1/ The medically needy are aged or disabled individuals and families with children who would be eligible for SSI or AFDC cash benefits, respectively, but for the fact that their income or resources exceed the limits of the cash programs. 42 U.S.C. §1396a(a)(10)(C). States are required to provide Medicaid coverage to SSI and AFDC recipients, who are known as the "categorically needy." 42 U.S.C. §1396a(a)(10)(A).

> in the case of groups consisting of aged, blind, or disabled individuals ..., and which shall be the same methodology which would be employed under the appropriate State plan ... to which such group is most closely categorically related in the case of other groups.

Amici are intervenors in pending administrative hearings, described at pp. 4-8, infra, which the State of California requested pursuant to 42 U.S.C. §1316(a)(2),(b) and 45 C.F.R. §201.4. In those proceedings, California seeks to maintain Medicaid eligibility criteria for its aged and disabled medically needy which are less restrictive than those used in the related cash program -- there the SSI program.2/ Intervenors will contend

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2/ Section (a)(10)(C) links the Medicaid methodologies for the medically needy aged, blind and disabled to the SSI program, and those for families with children to the AFDC program. The analysis of its "same methodology" language is the same, no matter which group of medically needy recipients is involved.

that California's criteria are consistent with and authorized by §(a)(10)(C).

Respondents here maintain only that Massachusetts cannot maintain Medicaid criteria which are more restrictive than those used in the AFDC program. Nevertheless, both Petitioner and the United States seemingly ask this Court to assume, in passing, that more liberal criteria are prohibited. Pet. Br. at 10 n.9, 24, 34 n.25; Br. of United States at 5. If these two aspects of §(a)(10)(C) are not carefully distinguished, this Court's construction of §1902(a)(10)(C)'s "same methodology" language may affect the interests of amici, of other similarly situated residents of California, and of thousands of medically needy individuals in other states. Amici urge that the Court address only the issue before it,

leaving the question of more liberal criteria to another day.

Susan Reed

Amicus Susan Reed is an intervenor in a pending HHS reconsideration proceeding concerning California State Plan Amendment 85-24. California proposes to treat the income of an aged or disabled medically needy Medicaid recipient as unavailable to the extent that it is used to pay spousal or child support pursuant to court order or an agreement with a District Attorney.[3/]

3/ The State's Department of Health Services ("DHS") submitted its plan amendment to HHS after a state court invalidated a DHS regulation which treated income used by aged and disabled medically needy Medicaid recipients to comply with family support obligations as nevertheless available to meet their own needs. Gibbons v. Rank, CCH Medicare and Medicaid Guide ¶33995 (Alameda Cty. Super. Ct., 1984). Amicus was a plaintiff in that action.

The Acting Administrator of HHS' Health Care Financing Administration (HCFA) initially disapproved California's plan amendment on the ground that in the SSI program, income used to pay family support payments nonetheless must be considered available to meet the needs of an aged or disabled SSI recipient. According to the Administrator, §(a)(10)(C) prohibits the State from maintaining a Medicaid methodology for determining income eligibility which is more liberal than that used for determining SSI eligibility. 51 Fed. Reg. 3512 (January 28, 1986).

Amicus' husband, Robert Reed, has been semi-comotose since he was in an accident in 1975. He needs skilled nursing care, which can only be provided in a long term care facility. Mr. Reed is under a court order to pay child support

of $800 per month for the care of his two children. If the Secretary of HHS finally disapproves California's state plan amendment, and if that determination is upheld in the Court of Appeals, to which the State may appeal directly, (42 U.S.C. §1316(a)(3)), Susan Reed, as conservator of her husband, will risk having her husband evicted from the nursing home for failure to pay his share of his medical bills. Alternatively, she will have to forego court-ordered child support payments, thereby depriving her children of necessities.

Wadie Reese

Wadie Reese is a plaintiff in Reese v. Kizer, No. H-104037-3 (Alameda Cty. Super. Ct.). That case seeks to enforce Cal. Welfare & Institutions Code §14005.16(a), which provides that, for Medicaid eligibility purposes, a non-

institutionalized spouse's community property interest in her medically needy institutionalized spouse's income is not available to meet his needs. The Director of California's Department of Health Services refused to implement the state law after HHS advised the State that the statute violates §(a)(10)(C), since community property rules are not applied in the SSI program.

On April 19, 1985, the Superior Court entered a preliminary injunction requiring, on state law grounds, that DHS implement the statute. Pursuant to that injunction, Mrs. Reese, who is entirely dependent upon her husband for support, receives $630 per month. But for the injunction, she would receive an allowance of only $509, an amount insufficient to meet her basic needs.

California State Plan Amendment 85-5

reflects the terms of the Reese injunction. The Acting Administrator of HCFA initially disapproved the plan amendment because it assertedly conflicts with §(a)(10)(C). 51 Fed. Reg. 3513 (January 28, 1986).4/ California has requested a reconsideration hearing, in which amicus Reese is an intervenor.

SUMMARY OF ARGUMENT

Relying upon the legislative history of TEFRA and express congressional authorization contained in the Deficit

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4/ A related issue is pending in Purser v. Rahm, 104 Wn.2d 159, 702 P.2d 1196 (1985), petition for cert. filed, 54 U.S.L.W. 331 (U.S. Nov. 5, 1985) (No. 85-663). As a result of the Purser decision, Washington submitted a state plan amendment which was disapproved. 50 Fed. Reg. 20,857 (May 20, 1985). After a reconsideration hearing, the Secretary of HHS issued a final decision on February 5, 1986, disapproving the amendment. The State may appeal to the Ninth Circuit within sixty (60) days. 42 U.S.C. §1316(a)(3).

Reduction Act of 1984, many states have adopted medically needy methodologies and standards more liberal than those used in the cash assistance programs. This Court need not and should not decide whether the Medicaid Act permits such methodologies and standards, since respondents contend only that Massachusetts may not maintain a methodology which is more restrictive than that used in the State's AFDC program.

ARGUMENT

THE COURT SHOULD NOT INTIMATE THAT TEFRA REQUIRES STATES TO USE MEDICALLY NEEDY METHODOLOGIES IDENTICAL TO THOSE USED IN THE CASH ASSISTANCE PROGRAMS, SINCE CONGRESS HAS CLEARLY AUTHORIZED MORE LIBERAL METHODOLOGIES

Section 1902(a)(10)(C) requires that states use the "same" methodologies in their medically needy programs as are used in the cash assistance programs. The history of this provision reveals that, when Congress enacted the "same

methodology" language in the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub. L. No. 97-248, §137(a)(8), 96 Stat. 324, 378, it clearly did not intend to prohibit states from adopting more generous methodologies better suited than cash assistance criteria to the needs of the medically needy, a group which tends to suffer from serious and debilitating illnesses frequently necessitating hospitalization or long term skilled nursing care. See generally Wulsin, Adopting A Medically Needy Program, 18 Clearinghouse Rev. 841, 847-48 (1984).

Prior to 1981, §1902(a)(10)(C) required that eligibility standards for the medically needy be "comparable" to those used for the categorically needy. Both HHS and the courts understood this language to mean that states were prohibited from using medically needy criteria

which were more restrictive than those used in the cash assistance programs, but were permitted to use more liberal standards. See, e.g., 42 C.F.R. §§ 435.401(c),5/ 435.812, 435.840 (1979). See generally, Caldwell v. Blum, 621 F.2d 491, 495 (2d Cir. 1980); Calkins v. Blum, 511 F.Supp. 1073, 1091 (N.D.N.Y. 1981), aff'd, 675 F.2d 44 (2d Cir. 1982); 42 Fed. Reg. 2684, 2685 (January 13, 1977) ("[W]hile a state might use more generous maintenance amounts in determining financial eligibility (i.e., medically needy levels ..., disregards or asset exemptions) all other SSI eligibility criteria are to be used.") See also H.R. Rep. No. 861, 98th Cong. 2d Sess. 1366-1367 (1984), reprinted in 1984 U.S. Code Cong. & Admin. News 2054.

5/ This regulation has not been repealed or amended.

In 1981, Congress amended §(a)(10)(C) to give states additional flexibility in designing their medically needy programs. Pub. L. 97-35, §2171(a)(3), 95 Stat. 357, 807. During debate, the managers of the bill made clear that Congress did not intend to permit any change in existing comparability rules. 127 Cong. Rec. 18,957 (middle column) (July 31, 1981) (Rep. Dingell); Id. at 18,948 (middle column) (Rep. Waxman). See generally DeJesus v. Perales, 770 F.2d 316, 325 (2d Cir. 1985), petition for cert. docketed, (February 7, 1986) (No. 85-6337). Nevertheless, in September, 1981 HHS issued regulations which for the first time permitted more restrictive methodologies. 46 Fed. Reg. 47976, 47980 (Sept. 30, 1981).

When it enacted TEFRA, Congress carefully explained that the purpose of

§(a)(10)(C)'s "single standard" and "same methodology" language was to restore the pre-1981 comparability rules. H.R. Rep. No. 757, Pt. 1, 97th Cong. 2d Sess. 13 (1982). Congress thereby reaffirmed that states were prohibited from imposing "more restrictive standards and methodologies than under previous law." H.R. Rep. No. 861, supra, at 1366-67 (emphasis added). See, DeJesus v. Perales, supra, at 326 n.12.

Despite Congress' clear explanation of its intent, the Secretary rigidly construed the new language of §(a)(10)(C). She took the position that, whereas previously states could deviate from cash assistance eligibility criteria in order to adopt more liberal standards and methodologies, after TEFRA they were required to use the identical methodologies for determining income and resource

eligibility as are applied in the AFDC or SSI programs.

As Congress subsequently found, "The Department's overly restrictive interpretation has posed grave administrative problems for the States and threatens to cause great hardships for applicants and beneficiaries." H.R. Rep. No. 861, supra, at 1367. For example, HHS has refused to permit states to grant mid-month Medicaid eligibility to medically needy applicants once they spend their resources down to the applicable standard, but rather has required states to delay eligibility until the first of the following month, as is done in the SSI program. Id. See also, 51 Fed. Reg. 1301 (January 10, 1986) (despite Congress' intent to remedy this problem, HCFA disapproves North Carolina's proposal to provide Medicaid coverage for the month in which resources are reduced

to the eligibility level). As a result, medically needy institutionalized Medicaid recipients faced with the high cost of nursing home care are forced to deplete their exempt resources.

Congress acted swiftly to pretermit the Secretary's overly rigid interpretation of the TEFRA language. In §2373(c)(1) of the Deficit Reduction Act of 1984 ("DRA"), Pub. L. 98-369, 98 Stat. 494, 1112, Congress stayed the Secretary's literal enforcement of §(a)(10)(C)'s "same methodology" requirement pending a "moratorium" period of at least thirty (30) months. During that time, the conference committee directed that, "States may use less restrictive standards and methodologies in their noncash programs, although they are still foreclosed from being more restrictive than the relevant cash assistance programs." H.R. Rep. No. 861,

supra, at 1368.

Despite the clarity of the DRA moratorium provision, the Secretary has nevertheless refused to approve state plan amendments submitted after enactment of the DRA which adopt standards and methodologies more liberal than those used in the cash programs. Rather, the Secretary has taken the position that the moratorium applies only to state plans existing as of July 18, 1984, the effective date of the DRA. He maintains that policy to this day, despite the fact that both Houses of Congress have expressly disapproved that interpretation. H.R. 1868, §9; H.R. Rep. 99-80, Pt. 2, 99th Cong. 1st Sess. 27-28 (1985); S. 1730, §759C; S. Rep. 99-146, 99th Cong.

1st Sess. 319-321 (1985).6/

The California and North Carolina state plan amendments described above have fallen prey to the Secretary's persistent refusal to abide by Congress' intent. See pp. 4-8, 14, supra. Nor are these the only states to be frustrated in their efforts to meet the needs of the medically needy. See, e.g., 51 Fed. Reg. 4653-54 (February 6, 1986) (disapproving South Carolina amendment proposing to use a single automobile resource exclusion for all medically needy, because the exclusion, derived from the SSI program, is more liberal than that used in the AFDC program); 50 Fed. Reg. 48,642 (November

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6/ The relevant language of the House and Senate reports is set out in the Appendix. The Senate provision is incorporated in the pending Consolidated Omnibus Budget Reconciliation Act of 1985, H.R. 3128, §9521.

28, 1985) (disapproving Virginia State Plan Amendment 84-13, proposing to use uniform, SSI-related criteria for all medically needy recipients, including AFDC-linked families); 50 Fed. Reg. 32,642 (August 14, 1985) (disapproving Minnesota amendment proposing to use a number of income and resource methodologies more liberal than those used in the related cash assistance programs).

The courts have only recently begun to consider the meaning of §(a)(10)(C) in light of the DRA moratorium provision. See, e.g., Cubanski v. Heckler, No. 85-7123 (9th Cir. 2/7/86) (available February 28, 1986 on LEXIS, Genfed library, U.S. App. file) (allowing states to maintain an income standard for adult couples less restrictive than that required for a family of a parent and child). Compare, Camacho v. Perales, No. 85-7139 (2d Cir.

1/24/86), petition for reh'g pending (available February 28, 1986 on LEXIS, Genfed library, U.S.App. file) (refusing to permit the State to use a methodology which is, in its totality, less restrictive than that used in the SSI program); Rivera v. Commissioner of Public Welfare, 395 Mass. 189, 479 N.E.2d 639 (1985), cert. granted on other grounds, 54 U.S.L.W. 3392 (U.S. Dec. 10, 1985) (No. 85-632) (holding that state statute which applied earned income disregards more liberal than those used in the AFDC program violates (a)(10)(C)).7/ Given the

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7/ In a footnote, the Massachusetts Supreme Judicial Court read the DRA moratorium to prevent HHS from penalizing a state for refusing to use medically needy eligibility standards which are more restrictive than the related cash assistance programs. The Court found it "unnecessary to examine the moratorium to determine to what extent the State may use a less restrictive standard." 479 N.E.2d at 643 n. 7. This aside simply stands the DRA moratorium on its head, as Petitioner notes. (Pet. Br. at 48 n.31).

numerous pending reconsideration hearings involving the meaning of §(a)(10)(C) and of the moratorium, it can be expected that there will soon be a developing body of case law on the subject. Until this Court has before it a case or controversy to "assure that concrete adverseness which sharpens the presentation of [such] issues ...," Baker v. Carr, 369 U.S. 186, 204 (1962), it should neither decide whether §(a)(10)(C) permits more liberal medically needy methodologies than those used in the cash assistance programs, nor intimate that identical methodologies are required.

CONCLUSION

Since 1982, Congress has expressed its intent in words of exceptional clarity. States are prohibited from using more restrictive medically needy methodologies than are used in the cash assistance programs, but are free to use

more liberal criteria. Nevertheless, in their briefs, Petitioner and the United States invite the Court to assume that Massachusetts' medically needy methodologies must be identical to those used in the related AFDC program. The Court should decline unnecessarily to tread upon waters which, at this date, are so turbulent, and should make clear that it does not decide that question here.

Respectfully submitted,

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APPENDIX

S. Rep. 99-146, 99th Cong.
1st Sess. 319-321 (1985)

Clarification of Medicaid Moratorium Under DEFRA

Current Law - Under the "Omnibus Budget Reconciliation Act of 1981" States were given certain flexibility in structuring their medically needy programs. They were allowed to limit coverage to certain categories of persons and to vary the scope of services offered. Changes were not made in the financial eligibility requirements. However, implementing regulations made changes in the pre-OBRA financial eligibility rules and allowed the States to impose more restrictive standards and methodologies. The "Tax Equity and Fiscal Responsibility Act of 1982" (TEFRA) amended the Medicaid statute to clarify that Congress did not intend to change the policies governing

income and resource standards and methodologies for determining eligbility of the medically needy from those in effect prior to OBRA. The TEFRA provision specified that the methodology to be used in determining income and resource eligibility for the medically needy must be the same methodology used under the relevant cash assistance' program. However, a strict interpretation of this provision by the Department led to unintended and in certain cases, undesirable consequences. The "Deficit Reduction Act of 1984" (DEFRA) established a moratorium period during which the Secretary is directed not to take any compliance, disallowance penalty or other regulatory action against a State because a State in determining eligibility for noncash Medicaid recipients is using an income or resource standard or methodology

that is less restrictive than the applicable cash assistance standard or methodology. The Secretary was directed to report to Congress within 12 months of enactment on the impact on States and recipients of applying income and resource standards and methodologies under the cash assistance programs to noncash eligibles. The moratorium is to run from the date of enactment until 18 months after submission of the required report. DEFRA further specified that no provision of law could repeal or suspend the moratorium unless such provision specifically amended or repealed that provision.

In January, 1985, the Health Care Financing Administration issued a Medicaid Action Transmittal (85-1) to all State Medicaid agencies setting forth HCFA's interpretation of the moratorium provision of the Deficit Reduction Act. The

Transmittal concludes that the moratorium applies only where the "existing approved State plan" is or would be in violation of the requirement, as interpreted by HCFA, that the States apply the same methodology or standards to their non-cash assistance Medicaid beneficiaries as they apply to their cash assistance recipients. The Transmittal concludes, "Since the moratorium applies only where the existing approved State plan is or would be in violation of the provisions of section 1902(a)(10)(C)(i)(III) and since Medicaid eligibility quality control (MEQC) reviews are conducted against the approved State plan, the moratorium will have no effect on MEQC reviews or error rates for past or future periods."

This interpretation is inconsistent with the intent of Congress.

. . .

Explanation of provision. -- The provision would clarify that the moratorium on the Secretary's sanction activities applies to State Medicaid plans, whether or not approved, as well as the operation or administration of a Medicaid program by a State agency pursuant to that State plan. It also applies to any amendments to, or other changes in, a State plan, regardless of when the amendment or other change came to the Secretary's attention, and regardless of whether the Secretary has approved, disapproved, acted upon, or not acted upon the amendment or change. It applies to all States, including those States operating plans pursuant to section 1902(f) of the Social Security Act (relating to special eligibility rules for aged, blind, and disabled individuals receiving Supplemental Security Income).

It applies to Medicaid eligibility and quality control reviews and error rates for past and future periods.

. . .

Effective date. -- Effective as if included in the original DEFRA provision.

H.R. Rep. 99-80, Pt. 2 at 27-28,
99th Cong. 1st Sess. (1985)

Clarification of Medicaid Moratorium Provisions of the Deficit Reduction Act of 1984

The Committee bill clarifies that the current moratorium on the Secretary's imposition of any fiscal or other penalties on State Medicaid programs applies to State Medicaid plans, and State Medicaid program operations, whether approved or not, in all States. The content and reasoning of the Medicaid Action Transmittal No. 85-1, issued by the Health Care Financing Administration in January, 1985, in an apparent effort to nullify the moratorium, are specifically rejected.

Section 2373(c) of the Deficit Reduction Act of 1984, P.L. 98-369, prohibits the Secretary of Health and

Human Services from taking any compliance, disallowance, penalty, or other regulatory action against a State because the State uses less restrictive standards or methodologies in determining the eligibility of Medicaid beneficiaries who do not receive cash assistance than it uses for those who do. The prohibition applies during a moratorium period that began on enactment of P.L. 98-369 (July 18, 1984) and will end 18 months after the Secretary submits to Congress her recommendations on the application of cash assistance eligibility standards and methodologies to the "medically needy" and other non-cash Medicaid eligibles.

In January, 1985, the Health Care Financing Administration issued a Medicaid Action Transmittal (85-1) to all State Medicaid agencies setting forth HCFA's interpretation of the moratorium provision

of the Deficit Reduction Act. The Transmittal concludes that the moratorium applies only where the "existing approved State plan" is or would be in violation of the requirement, as interpreted by HCFA, that the States apply the same methodology or standards to their non-cash assistance Medicaid beneficiaries as they apply to their cash assistance recipients. The Transmittal concludes, "Since the moratorium applies only where the existing approved State plan is or would be in violation of the provisions of section 1902(a)(10)(C)(i)(III) and since Medicaid eligibility quality control (MEQC) reviews are conducted against the approved State plan, the moratorium will have no effect on MEQC reviews or error rates for past or future periods."

This interpretation is completely erroneous and flatly inconsistent with the

intent of Congress. It finds no support whatsoever in the text of section 2373(c) of the Deficit Reduction Act itself, nor in the extensive Joint State of Managers of the Committee of Conference (H.Rep. 98-861, pp. 1366-1368), and the Committee is frankly at a loss to understand how HCFA could have so badly misread the provision. The Department's interpretation will lead to precisely the result that the moratorium was intended to avoid: grave administrative problems and serious fiscal difficulties for the States, and great hardship for Medicaid applicants and beneficiaries.

The Committee bill clarifies that the moratorium on the Secretary's sanction activities applies. It applies to State Medicaid plans, whether or not approved, as well as the operation or administration of a Medicaid program by a State agency

pursuant to that State plan. It applies to any amendments to, or other changes in, a State plan, regardless of when the amendment or other change came to the Secretary's attention, and regardless of whether the Secretary has approved, disapproved, acted upon, or not acted upon the amendment or change. It applies to all States, including those States operating plans pursuant to section 1902(f) of the Social Security Act (relating to special eligibility rules for aged, blind, and disabled individuals receiving Supplemental Security Income). It applies to Medicaid eligibility and quality control reviews and error rates for past and future periods. The moratorium applies.

The Committee expects that the Secretary will, immediately upon enactment

of this provision, notify the State Medicaid agencies that Medicaid Action Transmittal 85-1 is null and void and that a moratorium on compliance, disallowance, penalty, and other regulatory actions is in effect as provided by section 2373(c) of the Deficit Reduction Act of 1984, as amended by the Committee bill.